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Attorney(s) for Defendants Maryland Square  
Shopping Center, LLC,  
Herman Kishner, dba Maryland Square Shopping  
Center, Irwin Kishner, Jerry Engel, and  
Bank of America, as Trustee for  
The Herman Kishner Trust

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

PETER J. VOGGENTHALER; VICTOR  
BECERRA; ARTHUR BODENDORFER;  
BRENDA C. CHAFFIN; MICHAEL J. SOLMI;  
JASON COWLES; JANE GAUTHIER;  
HONORE GAUTHIER; NIKOLAS  
KONSTANTINOU; DRAGAN KURAJICA;  
KENNETH LOWTHER; JAMES LUEHMANN;  
JACQUELINE LUEHMANN; RUTH  
MANNHEIMER; WILLIAM MONTERO;  
BARBARA MONTERO; CLIFFORD ROGERS;  
SHARON ROGERS; HERMANN ROSNER;  
MARKUS ROTHKRANZ; DANIEL SOLDINI;  
CHARLES WALKER; VERNA WALKER;  
JACK YENCHEK; OFELIA YENCHEK;  
RICHARD MALM; ROGER ELLSWORTH; JO  
ANN ELLSWORTH; MARGARET  
RUDELICH-HOPPE; PATRICIA MAHONEY,  
individually and as trustee for the MAHONEY  
LIVING TRUST; RICHARD FALEN; PETER  
LEARNED; KRISTIAN MEIER; ELIZA  
ACOSTA; MIRHA ELIAS; AIKO BERGE

Plaintiffs,

vs.

MARYLAND SQUARE, LLC; MARYLAND  
SQUARE SHOPPING CENTER LIMITED  
LIABILITY COMPANY; HERMAN KISHNER  
dba MARYLAND SQUARE SHOPPING  
CENTER; IRWIN KISHNER, JERRY ENGEL,  
BANK OF AMERICA as Trustees for the  
HERMAN KISHNER TRUST; CLARK  
COUNTY SCHOOL DISTRICT; THE

Case No.: 2:08-cv-01618-LDG-GWF

**DEFENDANTS MARYLAND SQUARE  
SHOPPING CENTER, LLC, HERMAN  
KISHNER, DBA MARYLAND SQUARE  
SHOPPING CENTER, IRWIN KISHNER,  
JERRY ENGEL AND BANK OF  
AMERICA, AS TRUSTEE FOR THE  
HERMAN KISHNER TRUST'S ANSWER  
AND AFFIRMATIVE DEFENSES**

**(JURY TRIAL REQUESTED)**

BOULEVARD MALL, as successor-in-interest/surviving corporation/agent for BOULEVARD ASSOCIATES, LLC; BOULEVARD MALL I LLC, as successor-in-interest/surviving corporation/agent for BOULEVARD ASSOCIATES, L.L.C.; BOULEVARD MALL II LLC, as successor-in-interest/surviving corporation/agent for BOULEVARD ASSOCIATES, LLC; CONSTRUCTION DEVELOPERS INC.; FEDERATED WESTERN DEPT. STORES, INC.; GENERAL GROWTH PROPERTIES; MELVIN SHAPIRO; SHAPIRO BROS. INVESTMENT CO.; DELIA'S CLEANERS OF ARIZONA, INC.; CB RICHARD ELLIS

Defendants.

Defendants, Maryland Square Shopping Center, LLC, Herman Kishner, dba Maryland Square Shopping Center, Irwin Kishner, Jerry Engel and Bank of America, as Trustee for The Herman Kishner Trust ("Defendants"), by and through their attorneys of record, Jason M. Gerber, Esq. and Albert G. Marquis, Esq. of Marquis & Aurbach, hereby answer the Complaint filed against them in this action and state as follows:

#### **JURISDICTION AND VENUE**

1. In answering Paragraphs 1, 2 and 3 these answering Defendants admit the allegations contained therein.

#### **THE PARTIES**

2. In answering Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42 and 43, these answering Defendants are without sufficient information to form an opinion as to the truth of the allegations contained therein and therefore deny the same.

3. In answering Paragraphs 30, 31 and 32, these answering Defendants admit the allegations contained therein.

#### **GENERAL ALLEGATIONS OF FACT**

4. In answering Paragraphs 44, 46, 47, 48, 49, 51 and 52, these answering Defendants are without sufficient information to form an opinion as to the truth of the allegations contained therein and therefore deny the same.

1           5. In answering Paragraphs 45 and 54, these answering Defendants deny the  
2 allegations contained therein.

3           6. In answering Paragraph 50, these answering Defendants admit the allegations  
4 contained therein.

5           7. In answering Paragraph 53, these answering Defendants admit the allegations  
6 contained therein to the extent that the Defendants had knowledge of the NDEP's 2000 report  
7 and initial testing. These answering Defendants deny the remaining allegations in Paragraph 53.

8                                   **FIRST CAUSE OF ACTION**

9                                   **(RCRA, 42 U.S.C. § 6972(a)(1)(B))**

10           8. In answering Paragraph 55, these answering Defendants incorporate their  
11 responses to Paragraphs 1 to 54 as if fully set forth herein.

12           9. In answering Paragraph 56, these answering Defendants admit the allegations  
13 contained therein to the extent that a purported notice was sent by the Plaintiffs on March 19,  
14 2008. These answering Defendants deny the other allegations in Paragraph 56 directed to it and  
15 deny the remaining allegations of such paragraph for lack of information and belief sufficient to  
16 admit or deny such allegations.

17           10. In answering Paragraphs 57, 58, 59, 60 and 61 these answering Defendants are  
18 without sufficient information to form an opinion as to the truth of the allegations contained  
19 therein and therefore deny the same.

20           11. As Paragraphs 62 and 64 quote statutory provisions and contain legal conclusions,  
21 no answer from these answering Defendants is necessary. To the extent any answer is required;  
22 these answering Defendants deny the allegations of such paragraphs.

23           12. In answering Paragraph 63, these answering Defendants deny the allegations  
24 directed to other defendants for lack of information and belief sufficient to admit or deny such  
25 allegations and deny the remaining allegations in Paragraph 63.

26           13. In answering Paragraphs 65, 66, 67, 68, 69 and 70, these answering Defendants  
27 deny the allegations directed to other defendants for lack of information and belief sufficient to  
28 admit or deny such allegations and deny the remaining allegations of such paragraphs.

1           14. In answering Paragraph 71, these answering Defendants admit the Plaintiffs are  
2 seeking injunctive relief. These answering Defendants deny the Plaintiffs' right to recover the  
3 relief sought.

4           15. In answering Paragraph 72, these answering Defendants admit the Plaintiffs are  
5 seeking an award of costs and reasonable attorney and expert fees. These answering Defendants  
6 deny the Plaintiffs' right to recover the relief sought and otherwise deny the allegations of such  
7 paragraph.

8                                   **AFFIRMATIVE DEFENSES**

9                                   **FIRST AFFIRMATIVE DEFENSE**

10           The alleged presence of a substance under the Plaintiffs' properties and any alleged  
11 damage resulting therefrom were caused solely by (i) an act of God; (ii) a third party or (iii) any  
12 combination of the foregoing.

13                                  **SECOND AFFIRMATIVE DEFENSE**

14           Plaintiffs' claims are barred by any applicable statutes of limitations.

15                                  **THIRD AFFIRMATIVE DEFENSE**

16           Plaintiffs have failed to join all indispensable parties as required by Rule 19 of the  
17 Federal Rules of Civil Procedure.

18                                  **FOURTH AFFIRMATIVE DEFENSE**

19           Plaintiffs have waived any and all of the claims alleged in the Complaint.

20                                  **FIFTH AFFIRMATIVE DEFENSE**

21           Plaintiffs are estopped from asserting any and all of the claims alleged in the Complaint.

22                                  **SIXTH AFFIRMATIVE DEFENSE**

23           Plaintiffs' purported claims for relief against these answering Defendants are barred by  
24 the doctrine of laches.

25                                  **SEVENTH AFFIRMATIVE DEFENSE**

26           The Complaint fails to state facts sufficient to constitute a cause of action against these  
27 answering Defendants.

28                                  **EIGHTH AFFIRMATIVE DEFENSE**

1 To the extent that any substances are alleged to be present or beneath the Plaintiffs'  
2 properties, such substances do not substantially or permanently interfere with Plaintiffs' use and  
3 enjoyment of the property or constitute or create an imminent or substantial endangerment.

4 **NINTH AFFIRMATIVE DEFENSE**

5 At all times relevant to this action, these answering Defendants acted with due care and in  
6 accordance with all then-applicable statutory and regulatory requirements.

7 **TENTH AFFIRMATIVE DEFENSE**

8 Plaintiffs' cause of action is barred because Plaintiffs have not performed all necessary  
9 conditions precedent or exhausted their remedies and are, therefore, barred from any recovery.

10 **ELEVENTH AFFIRMATIVE DEFENSE**

11 These answering Defendants allege that they have satisfied, fulfilled and performed each  
12 and every obligation and duty imposed by law to the full extent of its responsibility as a property  
13 owner.

14 **TWELFTH AFFIRMATIVE DEFENSE**

15 These answering Defendants allege that any obligation they owed to Plaintiffs have been  
16 satisfied, released, or otherwise discharged.

17 **THIRTEENTH AFFIRMATIVE DEFENSE**

18 While expressly denying any liability, these answering Defendants allege that Plaintiffs  
19 are not entitled to any relief for any alleged threat to human health or the environment or  
20 imminent or substantial endangerment.

21 **FOURTEENTH AFFIRMATIVE DEFENSE**

22 Plaintiffs' Complaint is barred because the State of Nevada and/or the Administrator of  
23 the United States Environmental Protection Agency have taken such actions that prevents  
24 Plaintiffs from initiating and/or maintaining a citizen suit lawsuit, pursuant to 42 U.S.C. §6972.

25 **FIFTEENTH AFFIRMATIVE DEFENSE**

26 These answering Defendants' status as a property owner is not sufficient to impose any  
27 liability on it under 42 U.S.C. §6972.

28 ...

**SIXTEENTH AFFIRMATIVE DEFENSE**

These answering Defendants allege and reserve any and all defenses available under 42 U.S.C. §6972.

These answering Defendants reserve the right to amend these affirmative defenses as discovery unfolds and new information is discovered.

**PRAYER FOR RELIEF**

**WHEREFORE**, these answering Defendants request the following relief:

1. That Plaintiffs take nothing by virtue of the Complaint on file herein and that the same be dismissed with prejudice;
2. For an award for reasonable attorney fees and costs of suit incurred in the defense of this action; and
3. For such other and further relief as this court may deem just and proper in the premises

**JURY DEMAND**

Defendants, Maryland Square Shopping Center, LLC, Herman Kishner, dba Maryland Square Shopping Center, Irwin Kishner, Jerry Engel and Bank of America, as Trustee for The Herman Kishner Trust demand a trial by jury of all issues triable by jury.

DATED: This 20<sup>th</sup> day of January, 2009.

Respectfully submitted by:

MARQUIS & AURBACH

By: 

ALBERT G. MARQUIS, ESQ.  
Nevada State Bar No. 1919  
JASON M. GERBER, ESQ.  
Nevada Bar No. 9812  
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**NOTICE OF ELECTRONIC SERVICE  
PROOF OF SERVICE**

STATE OF NEVADA, COUNTY OF CLARK

I am employed in the County of Clark, State of Nevada. I am over the age of 18 and not a party to the within action; my business address is 10001 Park Run Drive, Las Vegas, NV 89145.

On January 20, 2009, the foregoing documents described as DEFENDANTS MARYLAND SQUARE SHOPPING CENTER, LLC, HERMAN KISHNER, DBA MARYLAND SQUARE SHOPPING CENTER, IRWIN KISHNER, JERRY ENGEL AND BANK OF AMERICA, AS TRUSTEE FOR THE HERMAN KISHNER TRUST'S ANSWER AND AFFIRMATIVE DEFENSES (JURY TRIAL REQUESTED) was served upon the parties in this action as set forth below:

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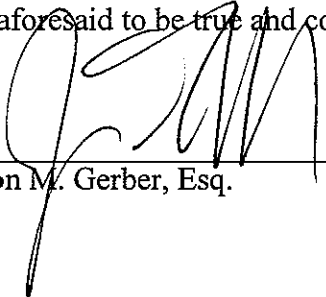
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1 [ X ] Electronically in accordance with United States District Court of the District of Nevada  
2 Electronic Filing Procedures, Section IV Service, B. Electronic Service.

3 I declare that I am employed in the office of a member of the bar of this court at whose  
4 direction the service was made.

5 Executed on January 20, 2009, at Las Vegas, Nevada. Under penalty of perjury under the  
6 laws of the State of Nevada I declare the aforesaid to be true and correct.

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9 Jason M. Gerber, Esq.  
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